

No. 11,883

IN THE
United States
Court of Appeals
For the Ninth Circuit

HAROLD B. BLAKE,

Appellant,

vs.

W. R. CHAMBERLIN & Co.,
a corporation,

Appellee.

APPELLEE'S REPLY BRIEF

JOHN ~~W.~~ BLACK,
HENRY W. SCHALDACH,
233 Sansome Street,
San Francisco, California.

LYMAN HENRY,
STEPHEN MCREAVERY,
HALL, HENRY & OLIVER,
Balfour Building,
San Francisco, California.

Attorneys for Appellee.

Subject Index

| | Page |
|--|------|
| Preliminary Statement | 1 |
| Statement of the Case..... | 2 |
| Argument | 9 |
| I. There Is Nothing Before the Court on This Appeal..... | 9 |
| (a) The Release, Having Been Received in Evidence Without Objection, Was Not Subject to a Motion to Strike | 9 |
| (b) The Trial Court's Denial of Plaintiff's Motion to Set Aside the Jury's Special Findings Cannot Be Considered by This Court..... | 10 |
| (c) The Trial Court's Order Denying Plaintiff's Mo- tion to Set Aside the Verdict, Judgment Thereon and for a New Trial Is Not Reviewable by This Court | 11 |
| (d) No Error in Instructing the Jury Is Before the Court | 13 |
| (e) No Error in the Refusal to Admit Certain Letters in Evidence Is Before the Court..... | 15 |
| (f) No Error With Respect to the Offer of Any Evi- dence by Appellee Is Before This Court..... | 15 |
| II. The Trial Court Did Not Err in Submitting the Re- lease to the Jury | 16 |
| (a) Preliminary | 16 |
| (b) There Is Substantial Evidence to Support the Ver- dict | 17 |
| III. The Trial Court Did Not Err in Instructing the Jury.. | 28 |
| IV. The Trial Court Did Not Err in Refusing to Admit Evidence | 29 |
| V. Appellee Offered No Misleading or Incorrect Evidence.. | 29 |
| VI. Conclusion | 30 |

Table of Authorities Cited

| CASES | Pages |
|--|--------|
| Al G. Barnes Amusement Co. v. Olvera (9 C.C.A., 1946) 154 F.2d 497, 499..... | 13 |
| Ames v. American Export Lines (D.C., S.D.N.Y., 1941) 41 F. Supp. 930 | 23 |
| | |
| Baten v. Kirby Lumber Corporation (5 C.C.A., 1939) 103 F.2d 272, 274..... | 11 |
| Bay State Dredging Co. v. Porter (1 C.C.A., 1946) 153 F.2d 827 | 26 |
| Benton v. United States (4 C.C.A., 1935) 80 F.2d 162..... | 13 |
| Bonici v. Standard Oil Co. (2 C.C.A., 1939) 103 F.2d 437... | 28 |
| | |
| Churchill v. More (1906) 4 Cal. App. 219, 224..... | 9 |
| | |
| Dam v. Lake Alise Riding School (1936) 6 Cal.2d 395, 401... | 29 |
| Denver-Laramie Realty Co. v. Wyoming Etc. Co. (8 C.C.A., 1915) 219 Fed. 155, 159..... | 9 |
| | |
| Estate of Loucks (1911) 160 Cal. 551, 559..... | 9 |
| Evans v. Johnston (1896) 115 Cal. 180, 183-4..... | 9 |
| | |
| Flint v. Youngstown Sheet & Tube Co. (2 C.C.A., 1944) 143 F.2d 923, 924..... | 12 |
| | |
| Galeota v. United States Gypsum Co. (2 C.C.A., 1941) 123 F.2d 947, 948 | 3, 16 |
| Garrett v. Moore-McCormack Co. (1942) 317 U.S. 239, 63 S. Ct. 246, 87 L.Ed. 239..... | 19 |
| | |
| Harmon v. United States (5 C.C.A., 1932) 59 F.2d 372, 373... 8, 21 | |
| Henry S. Grove (D.C., Md., 1927) 22 F.2d 444..... | 27 |
| Hume v. Moore McCormack Lines (2 C.C.A., 1941) 121 F. 2d 336 | 28 |
| | |
| Inland Power & Light Co. v. Grieger (9 C.C.A., 1937) 91 F.2d 811, 813, 818..... | 13, 16 |
| | |
| Johnson v. Andrus (2 C.C.A., 1941) 119 F.2d 287, 288..... | 22, 29 |

| | Pages |
|--|-----------|
| King v. Waterman S.S. Co. (D.C., S.D.N.Y., 1945) 61 F. Supp. 969 | L..... 26 |
| Maryland Casualty Co. v. Talley (5 C.C.A., 1940) 115 F.2d 807 | 11 |
| Mitchell v. Swift & Co. (5 C.C.A., 1945) 151 F.2d 770, 772..10, 12 | |
| Montilla v. United States (D.C., E.D.N.Y., 1946) 70 F. Supp. 181 | 24 |
| Muruaga v. United States (D.C., S.D.N.Y., 1948) 77 F. Supp. 848 | 24 |
| Oakland Barge Etc. Co. v. Foster (1914) 25 Cal. App. 193, 198 | 9 |
| Palmer v. Hoffman (1943) 318 U.S. 109, 63 S. Ct. 477, 87 L.ed. 645 | 14 |
| People v. Frank (1924) 193 Cal. 474..... | 15 |
| Schlitzkus v. U.S.A. (D.C., S.D.N.Y.) 1948 A.M.C. 688..... | 23, 24 |
| Sitchon v. American Export Lines (2 C.C.A., 1940) 113 F.2d 830, 832-3 | 21 |
| Stanley v. Weyerhauser (S.F. Super. Ct.) 1947 A.M.C. 411 | 27 |
| Stetson v. United States (9 C.C.A., 1946) 155 F.2d 359..... | 23, 29 |
| Stuart v. Alleoa S.S. Co. (2 C.C.A., 1944) 143 F.2d 178..... | 27 |
| United States v. Johnson (9 C.C.A., 1947) 160 F.2d 789..... | 25 |
| United States v. Klever (9 C.C.A., 1937) 93 F.2d 15..... | 2, 3 |

STATUTES

| | |
|---|--------|
| F.R.C.P., Rule 49(a), 28 U.S.C.A. foll. section 723c..... | 18 |
| F.R.C.P., Rule 51, 28 U.S.C.A. foll. section 723c..... | 10, 14 |

IN THE
United States
Court of Appeals
For the Ninth Circuit

HAROLD B. BLAKE,

Appellant,

vs.

W. R. CHAMBERLIN & Co.,
a corporation,

Appellee.

APPELLEE'S REPLY BRIEF

PRELIMINARY STATEMENT

The "Statement of the Case and Summary of the Evidence" contained in appellant's opening brief, together with a great majority of the arguments set forth therein, seem to have been framed on the erroneous assumption that appellant is entitled to a trial *de novo* on his appeal herein. Lest this false premise (coupled with the fact that the proceedings below were initiated with the filing of a "libel") mislead the Court, we wish to emphasize the

fact that, although these proceedings originated in admiralty, the cause was subsequently transferred to the *law* side of the District Court, so that appellant seaman might have the benefit of a trial by jury.¹

Under such circumstances all intendments are, of course, in favor of the judgment on the verdict and, in reviewing the evidence, this Court will take as true all facts which appellee's evidence tends to establish and will draw in its favor all inferences fairly deducible from such facts, without regard for the countervailing proof offered on behalf of appellant.

United States v. Klever (9 C.C.A., 1937) 93 F.2d 15.

Accordingly, we feel that the statement of the case presented at pages 5 to 20, inclusive, of appellant's brief (colored as it is by a great mass of conflicting testimony which must be ignored on this appeal) is so argumentative and inadequate that the Court will welcome the following statement of the facts as they must be deemed to have been found by the jury.

STATEMENT OF THE CASE

This was a seaman's action for negligence and for maintenance and cure (Cl. T., pp. 1-8). Although initiated in admiralty, the cause was subsequently transferred to the law side of the court, at plaintiff seaman's request, and tried before a jury (Cl. T., pp. 19-20). Verdicts were returned for defendant on each count and judgment was entered accordingly (Cl. T., pp. 35-38). Thereafter, plaintiff's motion for a new trial was denied and he noticed this

1. Appellant's opening brief, p. 2. Cl. T., pp. 19-20.

appeal (Cl. T., pp. 44-45). The facts, as the jury must be deemed to have found them,² are these:

Plaintiff Blake is an intelligent, well-educated man. He is a high school graduate, was in the Navy (where he studied electrical and diesel engineering), was foreman in a manufacturing plant, graduated from Maritime School and held a marine engineer's license (R., pp. 22, 172, 179, 182).

On June 18, 1943, Mr. Blake, age 33 years, signed on the Franklin K. Lane as Third Assistant Engineering Officer for a foreign voyage (R., p. 25). On October 2, 1943, while the vessel was at Calcutta, Blake complained to the Second Mate that he had diarrhea. He was given medicine, which he failed to continue taking; nevertheless his condition improved and he had no temperature. On the morning of October 7, the Master inquired as to his condition. Mr. Blake stated that he was "O.K." and went ashore. Upon his return to the vessel at 5:45 P.M., he was running a temperature and exhibited other symptoms of illness. He was given medicine. He refused to go to the hospital. At 10:30 P.M. the Master ordered that an ambulance be called and that Mr. Blake be sent to a United States Army hospital. Upon his arrival at the hospital, Mr. Blake's case was diagnosed as pneumonia (R., pp. 416, 531-2).

Previous to the date when he was sent to the hospital, Mr. Blake had exhibited no signs of illness to his fellows aboard the vessel (R., pp. 268, 388). He stated that he had not made his illness (if any) known to his fellow

2. *United States v. Klever*, *supra* (9 C.C.A., 1937) 93 F.2d 15; *Galeota v. United States Gypsum Co.* (2 C.C.A., 1941) 123 F.2d 947, 948.

officers and that he had worked regularly up to the day when he was taken to the hospital (R., pp. 31-2, 105). There has been no contention that there was any unseaworthy condition aboard the vessel which could either have caused or contributed to Mr. Blake's illness.

The vessel continued on her voyage and paid-off at Baltimore on December 9, 1943 (R., p. 494). After hospitalization at Calcutta and Bombay, Mr. Blake was repatriated aboard a hospital ship, arriving at San Pedro on February 8, 1948. He immediately reported to the United States Public Health Service at Los Angeles, becoming an out-patient (R., p. 447). After examining him, a Public Health Service doctor told Mr. Blake he had a "spot on the lung" (R., p. 114).

Mr. Blake called at the office of Mr. Murray Roberts, legal representative for defendant's underwriters, on March 13, 1944. At the beginning of the interview, Roberts asked Blake if he wished to be represented by counsel. Blake said he did not (R., pp. 444, 446). At that time, Robert's only information concerning Blake's case was contained in a copy of an entry in the vessel's log book; so he took a statement from Blake (R., pp. 446, 493). Roberts told Blake that he was entitled to his wages to the end of the voyage and to maintenance money for a reasonable time thereafter, irrespective of negligence (R., p. 526). He also told Blake that if he felt that his illness was occasioned by any negligence or by any unseaworthiness of the vessel, he could retain counsel and file suit (R., p. 446, 525-6). Blake stated that such was not the fact and signed a statement to that effect (R., p. 446).

Because of his uncertainty as to his condition, Blake was not interested in discussing settlement at that time. Roberts gave him an advance on maintenance and suggested that Blake get a medical report from the United States Public Health Service and also arranged for a medical examination by Dr. Schroeder (R., p. 447).

The certificate which the Public Health Service furnished to Blake and which he brought to Robert's office is Plaintiff's Exhibit #7 in evidence. The diagnosis stated therein was: "Lung abscess, left lower lobe; hernia, rt. femoral, incomplete; under observation for lt. femoral hernia." The certificate stated further that Blake would have to continue treatment for an indefinite period and that the prognosis was "Guarded."

Dr. Schroeder reported that Blake had suffered from lobar pneumonia with secondary lung abscesses; that he should be given a further trial of conservative therapy; that a phrenic crushing of the left side would not be of much help, although it could be tried. He was inclined to believe that a selective pneumothorax would be of more benefit. He felt that a diagnosis of tuberculosis was improbable, but that tests should be made for it. It was his opinion that healing would be slow and that Blake would probably be disabled for four to six months at least³ (R., pp. 449-50). Dr. Schroeder's findings and conclusions were read to Blake by Roberts (R., p. 447).

At the time Dr. Schroeder's findings and conclusions were read to him, Blake told Roberts that he was inter-

3. Dr. Schroeder did not believe that Blake had a hernia, and so stated in the report which was read to Blake by Roberts (R., pp. 449-50). That his conclusion was correct seems indisputable, in view of the fact that there has been no showing that the "hernia" has ever required any medical treatment.

ested in settling his case and made Roberts an offer of settlement in the sum of \$1,500, exclusive of two months wages that were due him to the termination of the voyage and the advances that had been given him. This offer was accepted by Roberts' principles and settlement, in the sum of \$2,130.00, was effected on May 23, 1943 (R., pp. 451, 455). As a part of the settlement Blake read and signed a "release of all claims and demands" (R., pp. 451, 528, 673-677). This release is Defendant's Exhibit G in evidence (R., pp. 452-454).

(For the convenience of the Court, a specimen copy of the release has been set opposite. The Court will note that it is made clear and unambiguous by the use of red and black type, blanks to be filled in with typewriter and pen, and the use of enlarged type in places. We submit that the jury could only have concluded that plaintiff Blake had full notice and knowledge of what he was signing and that his testimony that he thought he was giving a receipt for wages was unworthy of belief.)

We have made every effort to set forth the above statement of the facts, as we believe the jury must have found them, without embellishment, reserving the inferences that might be drawn therefrom for argument. However, in view of appellant's argumentative and contentious "Statement of the Case and Summary of the Evidence" we feel justified in pointing out at this time the conclusions which the jury were entitled to draw from the evidence placed before them:

FULL RELEASE OF ALL CLAIMS AND DEMANDS

Know ye, that I, **Harold B. Blake**

the undersigned, for and in consideration of the sum of **Two Thousand One Hundred Thirty and No/100 Dollars** (\$2,130.00)

the receipt whereof is hereby acknowledged, have remised, released and forever discharged and by these presents do for myself, my heirs, executors, administrators, and assigns, remise, release and forever discharge

United States of America, acting by and through the Administrator, War Shipping Administration, and its General Agents and Agents under Service Agreements, Berth Agents and Sub-Agents acting on their behalf, and Owners and in particular the vessel SS "Franklin K. Lane"

its engines, boilers, tackle, apparel and furniture, its owners, operators, charterers, lessors, managers, officers, and crew, and each of them and all persons, firms and corporations having any interest in or to said vessel, of and from any and all claims and demands of any and every kind, name, nature, or description, and from ANY AND ALL DAMAGES, injuries, actions or causes of action, either at law, in equity, or in admiralty, which I now have or in the future may have against it or them or any of them, including any and all claims or demands for wages, maintenance, cure, compensation, reimbursement, transportation, sustenance, or expense under any law or duty imposed by any law of the United States of America, or any State thereof, or for any other account, whether or not the same be now existent or known to me or whether it

injuries sustained by me on or about the 5th day of September, 1943, while in

the employ of said vessel and/or its owners and/or its agents at **Calcutta and Bombay, India**

when the undersigned sustained bilateral, bronchitis and developed pneumonia, lung abscess and other lung diseases and other severe illnesses.

The undersigned does hereby affirm and acknowledge that he has read over the foregoing Release and has had the same fully explained to him and fully understands and appreciates the foregoing words and terms and their effect, and being entirely satisfied with the settlement herein made, has affixed his signature hereto voluntarily and of his own free will and accord.

Witnessed by:

Murray W. Roberts

Harold B. Blake

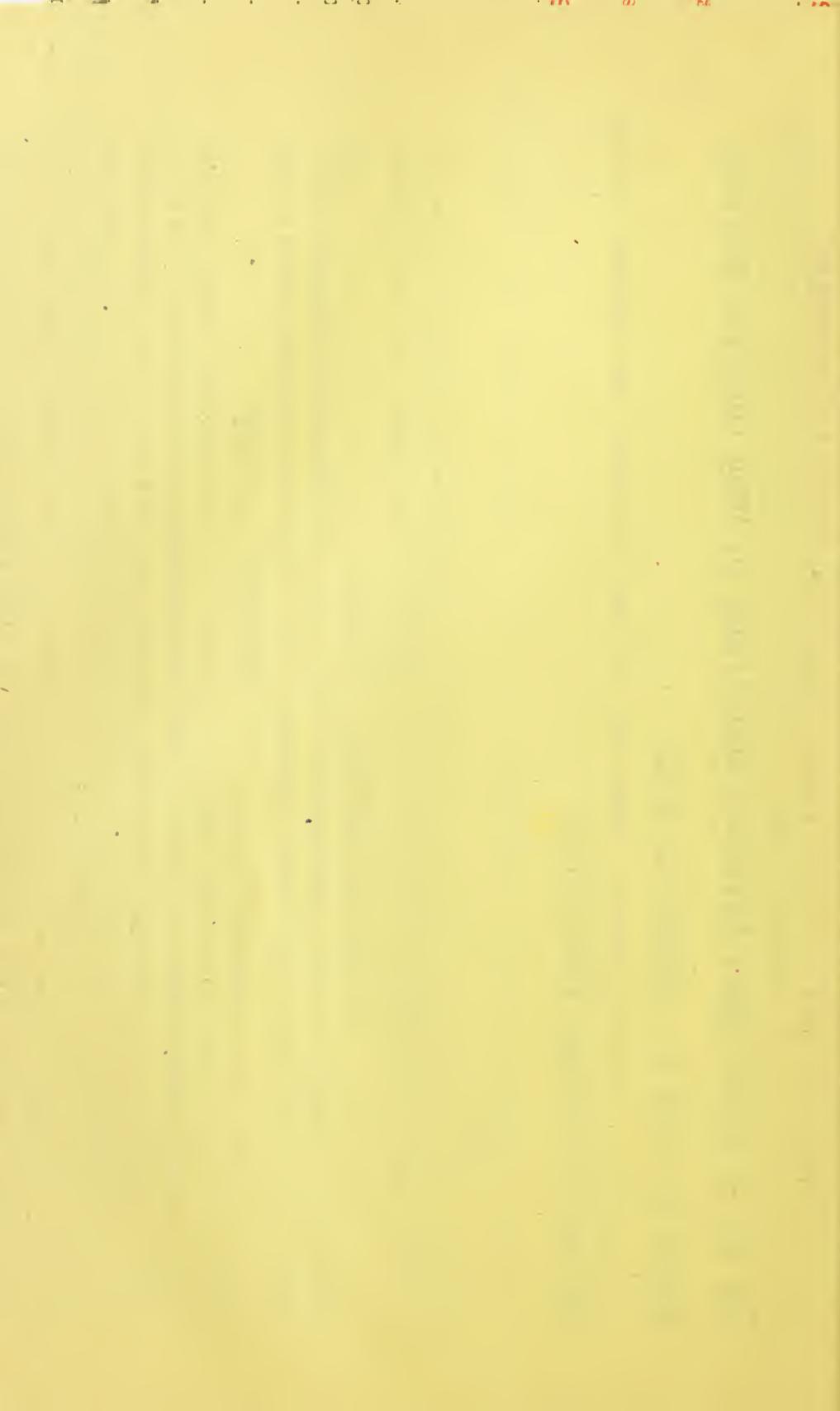
FULL RELEASE OF ALL CLAIMS

Do you understand that signing this paper settles and ends EVERY claim for DAMAGES, as well as for compensation, maintenance, cure and wages? Answer: *Yes*
(Claimant may write here either "yes" or "no," according to his understanding.)

Harold B. Blake

FULL RELEASE OF ALL CLAIMS

Dated **Wilm., Calif., May 1944**



(1) Blake was not coerced into making a settlement. He had from March 13th until May 23rd in which to consider the matter. The offer of settlement was made *by him* and the settlement was concluded on *his* terms.

(2) The consideration was more than adequate. Blake was paid the sum of \$1,500.00 in consideration of the release. In addition to this sum he received his wages to the termination of the voyage, repatriation bonus and maintenance money to the date of settlement.

(3) Blake was fully apprised of his physical condition at the time of settlement. The United States Public Health Service doctor had told him that he had a "spot on the lung." This agency had furnished him with a certificate which stated that he had a lung abscess, that he would have to continue under treatment for an indefinite period and that the prognosis of his case was "guarded." He had been advised, further, that it was Dr. Schroeder's opinion that radical therapy might be necessary and that, although a diagnosis of tuberculosis was improbable, tests should be made for it.

(4) Blake had been fully advised as to his legal rights in the matter and had had ample time in which to retain counsel, if he so desired. More than two months before the date of settlement, Roberts had asked Blake if he wished to retain counsel and had informed him as to his rights with respect to negligence, unseaworthiness and maintenance.

(5) Blake was not over-reached. He was aware of his legal rights and of the medical opinion concerning his case. He and Roberts acted on identical information. Neither of them had any reason to suppose that Blake

had any legitimate claim based on negligence and the facts developed at the trial clearly showed that he did not. Nor did it appear that the sum of \$1,500.00 was insufficient to provide Blake with maintenance during the period of his probable disability, based on the medical opinion concerning the case at the time of settlement.

(6) Blake understood the consequences of signing the release. He was an intelligent, well-educated man and the jury could not help but conclude that when he read and signed the release, Blake knew that he was waiving each and every claim which he might have against the defendant.

We submit that, on the basis of all the evidence, the jury properly concluded:

“Here is no case of a seaman in extremis pressed into a half understood agreement, which takes away an undoubted right. Here is a case of a matter in controversy, negotiations in regard to which, protracted over a considerable space of time in an atmosphere not of overreaching and double dealing, but of frankness and plain dealing, finally resulted in a settlement with nothing really set up to defeat it except the claim which of course may not avail, that one side obtained a better bargain than the other.”

Harmon v. United States (5 C.C.A., 1932) 59 F.2d 372, 373.

ARGUMENT**I.****There Is Nothing Before the Court on This Appeal****(a) THE RELEASE, HAVING BEEN RECEIVED IN EVIDENCE WITHOUT OBJECTION, WAS NOT SUBJECT TO A MOTION TO STRIKE.**

Appellant complains that the trial court erred in denying his motion to strike out the release. At the time the release was offered in evidence, the following colloquy occurred (R., pp. 451-452) :

Mr. Hoge: We offer this in evidence as Defendant's Exhibit next in order.

The Court: Any objection?

Mr. Resner: I have no objection.

The Court: It may be received and appropriately marked.

(Thereupon the statement referred to was received in evidence and marked Defendant's Exhibit G.)

Where evidence is admitted without objection, a motion to strike is properly denied.

Evans v. Johnston (1896) 115 Cal. 180, 183-4;

Estate of Loucks (1911) 160 Cal. 551, 559;

Churchill v. More (1906) 4 Cal. App. 219, 224;

Oakland Barge Etc. Co. v. Foster (1914) 25 Cal. App. 193, 198;

Denver-Laramie Realty Co. v. Wyoming Etc. Co.
(8 C.C.A., 1915) 219 Fed. 155, 159.

There is, of course, an exception to the rule where counsel has not had an opportunity to object prior to the reception of the evidence. Such obviously was not the case here. Counsel for plaintiff certainly was forewarned that the release would be offered in evidence, inasmuch as it

was set up as an affirmative defense in defendant's answer, and a copy of the release was attached thereto as an exhibit (Cl. T., pp. 16-17). Nevertheless, counsel for plaintiff specifically stated that he had no objection to the reception of the release in evidence. Under these circumstances, we submit, if the trial court erred in permitting the release to be received in evidence, such error was induced by counsel for plaintiff, who cannot now be heard to complain.

•

(b) THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION TO SET ASIDE THE JURY'S SPECIAL FINDINGS CANNOT BE CONSIDERED BY THIS COURT.

Appellant specifies as error the trial court's order denying his motion to set aside the jury's special findings. There are several answers to this contention:

First, this Court is one of limited jurisdiction and the order complained of is not appealable under the statute from which it derives its powers (28 U.S.C.A. 225).

Second, it does not appear that counsel for plaintiff made any request that the jury be instructed to disregard the release. Therefore, he is precluded from raising the point on this appeal.

F.R.C.P., Rule 51, 28 U.S.C.A. foll. section 723c.

Third, where special issues are submitted to the jury without objection, plaintiff cannot complain on appeal that the jury's findings on such issues are opposed to the great weight and preponderance of the evidence.

Mitchell v. Swift & Co. (5 C.C.A., 1945) 151 F.2d 770, 772.

In the case at bar counsel for plaintiff not only failed to object to the submission of the special issues on the question of the release, but they were submitted *at his request* (R., p. 461):

Mr. Resner: I should like a special finding on the release.

The Court: Will you frame that?

Mr. Resner: I will.

(c) THE TRIAL COURT'S ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT, JUDGMENT THEREON AND FOR A NEW TRIAL IS NOT REVIEWABLE BY THIS COURT.

As pointed out, *supra*, the release, having been received in evidence without objection, was not subject to a motion to strike. Plaintiff could, however, have requested a peremptory instruction to the jury to disregard the release. This he did not do. Nor did he move for a directed verdict. Instead, he requested that special issues be submitted to the jury on the question of the release (R., p. 461). With the record in such a state, no question of law is presented on this appeal.

Maryland Casualty Co. v. Talley (5 C.C.A., 1940)
115 F.2d 807.

As was stated in

Baten v. Kirby Lumber Corporation (5 C.C.A., 1939) 103 F.2d 272, 274,

“Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict. Rule of Civil Procedure 50, 28 U.S.C.A. following section 723c, does not do away with but emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient.”

Thus where special issues are submitted to the jury without objection, the findings on such issues are not reviewable on appeal.

Mitchell v. Swift & Co. (5 C.C.A., 1945) 151 F.2d 770, 772.

In

Flint v. Youngstown Sheet & Tube Co. (2 C.C.A., 1944) 143 F.2d 923, 924,

the court passed upon a situation closely analogous to that at bar as follows:

“The first point raised by the appellants, namely, that the verdict is not supported by the evidence is not open to them upon this record. At the conclusion of the evidence, when the plaintiffs rested, the defendant moved for a directed verdict, but the plaintiffs did not. Nor did they do so after the defendant had rested. When the verdict came in, they moved for a new trial on the ground that the verdict is ‘contrary to the evidence, and without evidence to support it.’ This motion was denied, and, when later renewed, was again denied. But such denials are of no avail to them. *In a federal court the denial of a motion for a new trial brings up nothing for review in an appellate court.* (citations) *If the plaintiffs wished to assert that there was no case to go to the jury, they were bound to move for a directed verdict.* They may not take a verdict and then complain that it is not what they expected; or at least their right to complain ends with the trial judge. (citation) Under federal practice an appellate court will not consider the question of the sufficiency of the evidence in the absence of a request for an instructed verdict.” (Italics added)

Accord,

Al G. Barnes Amusement Co. v. Olvera (9 C.C.A., 1946) 154 F.2d 497, 499;

Benton v. United States (4 C.C.A., 1935) 80 F.2d 162.

Assignments that the trial court erred in entering judgment on the verdict, in that the verdict was against law and unsupported by the evidence, and in denying a motion for a new trial present nothing for review.

Inland Power & Light Co. v. Grieger (9 C.C.A., 1937) 91 F.2d 811, 818.

(d) NO ERROR IN INSTRUCTING THE JURY IS BEFORE THE COURT.

Plaintiff complains of the following "instruction" set forth at page 39 of his opening brief, without reference to the transcript:

" 'Regardless of what may be your personal views as to which party to the contract derived the greater advantage, if there was as a matter of fact any greater advantage obtained by either side or, in other words, regardless of which party you may find to have obtained the greater advantage by said contract, if either party did, said release is binding if you find from the evidence that there was no failure of consideration for the execution of such release and that the plaintiff assented to the same and that he was not coerced into entering into said agreement through misrepresentation, fraud, mutual mistake, undue influence or duress.' ''

Plaintiff's argument as to the propriety of such instruction is meaningless and must be ignored, since the record shows that *no such instruction was given to the jury!* We

are confident that opposing counsel will acknowledge that his incorporation in the brief of a nonexistent instruction and argument thereon was an inadvertent error.

Plaintiff complains of two more "instructions," also set forth at page 39 of his opening brief. A diligent search on our part has revealed two paragraphs in the trial court's charge which are somewhat similar to, but by no means identical with the second and third paragraphs "quoted" in counsel's brief (R., pp. 725-726). Thus we are confronted with the unique situation where counsel for plaintiff complains in his brief of three "instructions," the first of which was not given at all and the second and third of which appear in the record in a form substantially different from that set forth by appellant. We submit that under these circumstances there is nothing before the Court, insofar as instructions are concerned.

An exception to instructions must be stated with sufficient particularity to advise the trial court of the particular error which is being complained of. Plaintiff's exceptions to instructions concerning the release are unintelligible to us (R., p. 734, line 24—p. 735, line 15). We assume they were equally baffling to the court below. If they can be deemed as specifying any particular error, it is only with respect to the "instruction" that was *not given*. Therefore, no error in instructions can possibly have been preserved.

F.R.C.P., Rule 51, 28 U.S.C.A. foll. section 723c;
Palmer v. Hoffman (1943) 318 U.S. 109, 63 S. Ct. 477, 87 L.ed. 645.

(e) NO ERROR IN THE REFUSAL TO ADMIT CERTAIN LETTERS IN EVIDENCE IS BEFORE THE COURT.

Counsel for appellant specifies as error the trial court's refusal to receive in evidence two letters (R., p. 583). No foundation was laid upon which the offer of these letters in evidence could have been predicated. Counsel did not attempt to identify the letters by any witness. In fact, no witness was on the stand at the time the offer was made (R., p. 582, line 15—p. 584, line 1). Under such circumstances, the trial court would have erred *had it admitted* the letters in evidence, inasmuch as a letter or telegram which has not been authenticated does not constitute competent evidence.

People v. Frank (1924) 193 Cal. 474.

(f) NO ERROR WITH RESPECT TO THE OFFER OF ANY EVIDENCE BY APPELLEE IS BEFORE THIS COURT.

The contention that defendant erroneously was allowed to offer certain misleading and incorrect evidence is absurd on its face: First, the payroll voucher and the official log book were received in evidence without objection (R., p. 531, 682-A). Second, any statement made by counsel does not constitute evidence, and the jury were so advised (R., p. 705, lines 20-22). Third, if counsel for defendant was in error in stating that Blake was paid his "earned wages" after his return to the States, this error may well have been induced by plaintiff and his counsel, who had both made similar statements somewhat earlier in the trial (R., p. 667, lines 3-25). Fourth, and most important, the *date* of payment was immaterial, it was the *fact* that payment had been made that was relevant, and that fact stands admitted.

II.

The Trial Court Did Not Err in Submitting the Release to the Jury**(a) PRELIMINARY.**

As we have pointed out, plaintiff evidently supposes that the Court is in a position to weigh the evidence and to reverse a judgment founded on a verdict against the weight of credible proof, but such is not the case in the United States Courts. A federal appellate court may only upset a verdict for failure of proof where the verdict is without substantial evidence to support it.

Galeota v. United States Gypsum Co. (2 C.C.A., 1941) 123 F.2d 947, 948.

In determining whether the evidence supports a judgment on a verdict, this Court will consider only the evidence most favorable to appellee, with every inference of fact that might be drawn therefrom. Assignments that the trial court erred in entering judgment on the verdict, in that the verdict was against law and unsupported by or against the weight of the evidence, and in denying a motion for a new trial present nothing for review.

Inland Power & Light Co. v. Grieger (9 C.C.A., 1937) 91 F.2d 811, 813, 818.

It is thus established that, even had appellant preserved a proper record in the court below, the only issue with respect to the release open to review in this Court would be whether or not there was sufficient evidence to justify the submission of the question of the validity of the release to the jury. We submit that, were such issue properly before the Court, it could not be resolved in favor of appellee.

(b) THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT.

Appellant opens his argument with the following statement: "It seems to us to be abundantly clear that the case turned upon the release taken from Mr. Blake. The jury did not even consider the question of negligence or additional maintenance for Mr. Blake * * *" (Ap. op. br., p. 21). In our opinion there is no merit to this contention.

The jury were instructed that a seaman is entitled to maintenance as of right, without regard for negligence and that the right continues after the voyage for a reasonable time in which to effect such improvement in the seaman's condition as reasonably may be expected (R., p. 721). They were instructed that the burden of sustaining the release was on the defendant and that they were to consider the following factors in determining its validity or invalidity: (1) The sufficiency of the consideration. (2) The medical advice given to the plaintiff. (3) The legal advice given to plaintiff as to his rights with respect to negligence and to future maintenance. (4) Whether plaintiff was over-reached, i.e., was the settlement made with plaintiff fair in all respects? (5) Whether Mr. Roberts made the full, fair and complete disclosure, with respect to plaintiff's rights, required of a fiduciary. And (6) whether there were grounds for reasonable difference of opinion as to the question of the liability or non-liability of the defendant to plaintiff for damages or for maintenance (R., pp. 722-5).

We submit that if the jury followed these instructions (and we must assume that they did follow them) they necessarily passed on the questions of negligence and additional maintenance. How else were they to determine

the sufficiency of the consideration, the adequacy of the medical and legal advice, whether the settlement was fair to plaintiff in all respects, and whether Mr. Roberts had fulfilled his role as fiduciary?

If it be deemed that the jury did not consider the questions of negligence and additional maintenance, then the trial court did so. Rule 49(a) provides that if in submitting special issues to the jury "the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, *it shall be deemed to have made a finding in accord with the judgment on the special verdict.*

F.R.C.P., Rule 49(a), 28 U.S.C.A. foll. section 723c.

It was plaintiff who asked that the special issues with respect to the release be submitted to the jury (R., p. 461). Accordingly, he cannot now be heard to complain that the jury failed to find on all of the material issues.

Inasmuch as we have set forth, in our Statement of the Case, the material facts as they must be deemed to exist on this appeal, we do not feel it necessary to comment extensively on appellant's version of them. However, we are perplexed by counsel's mathematics in arriving at the conclusion that Mr. Blake was paid only \$900.00 for the release. He asked for \$1,500.00, plus two months' wages and his maintenance to the date of settlement. That is exactly what he received, the total being \$2,130.00. Upon what theory counsel contends that he received \$900.00 for the release, instead of the \$1,500.00 which he was paid,

we cannot understand. Whatever rights Blake had to future maintenance were waived in consideration of the settlement.

Counsel for appellant relies heavily on *Garrett v. Moore-McCormack Co.* (1942) 317 U.S. 239, 63 S. Ct. 246, 87 L.Ed. 239. We have no quarrel with the principles enunciated therein. In the *Garrett* case the Supreme Court had no occasion to pass upon the validity of a release. The sole question decided was that state courts were bound to follow the long-established admiralty rule that the burden of sustaining the validity of a seaman's release is on the defendant. In describing the nature of this burden, the Court said:

“We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed *freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights.* The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are *relevant* to an appraisal of his understanding.” (63 S. Ct. 252)

We submit that the defendant in the case at bar has more than sustained the burden imposed upon it. It is obvious that Blake executed the release freely and without deception or coercion. He was not rushed into concluding a settlement. He first saw Roberts on March 13th and the settlement was not concluded until May 23rd. The offer of settlement came from Blake, after he had had ample time to consider the matter and settlement was concluded on his terms. He was told that he was entitled to his wages to the end of the voyage and to maintenance money for a reasonable time thereafter, without regard to negligence.

He was also told that if he felt his illness was occasioned by unseaworthiness of the vessel, or by negligence, he could retain counsel and file suit. He stated that such was not the fact. There was no occasion for Roberts to give Blake a detailed explanation of the word "unseaworthiness." Nothing in Blake's statement to Roberts suggested that the vessel was unseaworthy and no such contention was made at the trial. Nor did Roberts have any information either from Blake or from the vessel which would lead him to conclude that there had been any negligence in failing to render Blake proper medical care. Certainly there was no showing of such negligence at the trial. Mr. Blake's testimony that he did not have a full understanding of his rights at the time of settlement went to his credibility as a witness, was contradicted by other evidence and the jury were not bound to believe him.

The jury were certainly justified in finding that the consideration paid to Blake was adequate. He received \$1,500.00 over and above his wages to the end of the voyage and his maintenance money to the date of settlement. He was fully advised of his physical condition at the time of settlement. The United States Public Health Service doctors had diagnosed him as having a lung abscess. Their certificate stated that he would have to continue treatment for an indefinite period and that their prognosis was *guarded*. Dr. Schroeder's diagnosis was substantially in accord with that of the Public Health Service doctors. It was his opinion that Blake should be given a further trial of conservative therapy, but that certain radical procedures might be tried. It was his opinion, further, that healing would be slow and that

Blake would be disabled for *at least* four to six months. Blake was fully informed as to these diagnoses and opinions at the time he made his offer of settlement.

We submit that the evidence clearly supports the jury's verdict. As was said in *Harmon v. United States* (5 C.C.A., 1932) 59 F.2d 372, 373:

“While the record would easily support a finding that in releasing his claim appellant did not act wisely, it does not at all appear therefrom that he was either mentally or physically incapacitated from fully understanding and appreciating what he deliberately did. On the contrary, a careful reading of the record permits no other view than that appellant thoroughly understood the contents of the instrument which he signed, was well advised of all the facts and circumstances, including the state of the medical opinion as to his case, and well knew the consequences of its signing. *Here is no case of a seaman in extremis pressed into a half understood agreement, which takes away an undoubted right. Here is a case of a matter in controversy, negotiations in regard to which, protracted over a considerable space of time in an atmosphere not of overreaching and double dealing, but of frankness and plain dealing, finally resulted in a settlement with nothing really set up to defeat it except the claim which of course may not avail, that one side obtained a better bargain than the other.* (Italics added)

The *Harmon* case was cited by the Supreme Court in the *Garrett* case.

In *Sitchon v. American Export Lines* (2 C.C.A., 1940) 113 F.2d 830, 832-3, also cited in the *Garrett* case, plaintiff seaman suffered a head injury. He was treated at the

Marine Hospital and employed an attorney who negotiated a settlement for the sum of \$180.00, for which the seaman gave a release, covering all injuries *known and unknown* for which the defendant might be liable. After the settlement was concluded, plaintiff was examined by another physician. The examination showed a fractured skull which was bound to result in permanent disability. Plaintiff employed another attorney and brought action. Defendant pleaded the release and moved for *summary judgment*, which was granted by the trial court. In affirming the judgment the appellate court declared:

“When a seaman has made a settlement after full investigation and with independent advice, we can see no ground for holding it invalid. The question *in any case* is whether the seaman, *if he is acting alone, has intelligence enough fully to understand the situation and the risk he takes in giving up the right to prosecute his claim* or whether, if he is acting under advice, that advice is disinterested and based on a reasonable investigation. * * * Each party entered into a settlement based on identical information and conducted in the fairest manner.” (Italics added)

In *Johnson v. Andrus* (2 C.C.A., 1941) 119 F.2d 287, 288, the Second Circuit again upheld the validity of a seaman’s release, stating:

“We need not consider the original validity of Johnson’s claims, because we agree with Judge Hincks that whatever they were, he released them with full knowledge of what he was doing, and for an adequate consideration, satisfactory to himself.

* * * * *

“Scrutinize this transaction as one will, if the finding is accepted, there was not a shadow of overreaching

in its procurement, to set it aside would in effect deny to seamen the freedom to settle their controversies upon their own terms, which, as we said in *Bonici v. Standard Oil Company*, *supra*, would serve in no sense to protect them, but on the contrary would force them to a suit in every case."

We submit that this language is directly applicable to the case at bar. If the defendant's evidence is accepted, as it must be on this appeal, to set aside the release would be to declare all seamen's releases invalid and to force them to suit in every case.

This Honorable Court had occasion to review the action of the trial court in upholding the validity of a seaman's release in *Stetson v. United States* (9 C.C.A., 1946) 155 F.2d 359. There (as here) appellant argued that the District Court erred in finding that the seaman had executed the release with a full understanding of his rights. The court held that the findings were supported by substantial evidence, not clearly erroneous and hence should not be disturbed.

Ames v. American Export Lines (D.C., S.D.N.Y., 1941) 41 F. Supp. 930, was a case where the plaintiff admitted signing a release, but claimed (as does appellant) that he thought it was merely a receipt for wages. There was no charge of any misrepresentations by the defendant. A motion to dismiss the complaint was granted.

Schlitzkus v. U.S.A. (D.C., S.D.N.Y.) 1948 A.M.C. 688, is pertinent in that the form of release upheld therein was identical with the one in the instant case, and the circumstances surrounding its execution were closely analogous to those before the Court. Libellant was injured aboard

ship and was hospitalized. After his repatriation he went to the office of the steamship company where he made a statement concerning the details of his accident and injuries. After some negotiations he signed the release in return for \$1,090.69. He was unrepresented by counsel, was an out-patient at the Marine Hospital and was examined by a company doctor. Both the Marine Hospital doctor and the company doctor gave him an estimated disability of six months. It later developed that libellant had suffered some permanent disability as a result of the accident. The court concluded that libellant was aware of the extent of his injuries and understood what he was doing when he signed the release. In commenting on the release the court said:

“The release is made clear and unambiguous by the use of red and black type and by filling in blanks with typewriter and pen, and the use of enlarged type in places. The release was made as plain and understandable to one when it was presented for signature as human and legal ingenuity could make it.

* * * * *

“Certainly libellant had full notice of and full knowledge of what he was signing.

“*The fact that libellant was without a lawyer to counsel him, alone is not enough to set aside this release in view of all the facts and circumstances disclosed.*” (1948 A.M.C. 691-2)

Montilla v. United States (D.C., E.D.N.Y., 1946) 70 F. Supp. 181 and *Muruaga v. United States* (D.C., S.D.N.Y., 1948) 77 F. Supp. 848, are each cases wherein a seaman gave a release and then subsequently discovered that he was permanently disabled. In each case the court found

no negligence, noted that the right to maintenance and cure continues only for a reasonable time, and upheld the validity of the release.

We submit, on the basis of the foregoing authorities, that not only was there ample evidence in the instant case to justify submission of the question of the validity of the release to the jury, but the facts and circumstances were such that a failure to do so would have been error.

We now address ourselves to the cases cited by appellant as holding seamen's cases invalid:

United States v. Johnson (9 C.C.A., 1947) 160 F.2d 789, was before this Court as a trial *de novo*. Libellant was struck on the head by a falling block and brought action for negligence under the Jones Act and for maintenance and cure. Respondent pleaded a general release. In holding the release invalid the Court tested its validity by the standard set by the Supreme Court in the *Garrett* case and found that, at the time he signed the release, libellant had no understanding either of his legal rights or of his current physical condition. (He believed himself recovered when in fact he was not.) Although respondent's agent admitted that, at the time the release was signed, he had in his possession information which indicated that libellant had a possible right of action under the Jones Act, he told libellant nothing of this information or of his rights under that Act; nor did he suggest that libellant consult a doctor or an attorney. Under such circumstances the release was clearly invalid.

We submit that there is no analogy between the *Johnson* case and the instant case, as appellant suggests. Blake was asked if he wished to retain counsel. He was told that he had an absolute right to his wages to the

end of the voyage and to maintenance for a reasonable time thereafter. He was advised that if he felt that his illness had been occasioned by any negligence or unseaworthiness of the vessel, he could retain counsel and file suit. He was sent to an independent doctor (at the United States Public Health Service) and to Dr. Schroeder for medical reports. Hence, he was fully aware of his physical condition and of his legal rights when he signed the release. Furthermore, the *Johnson* case was a trial *de novo*, wherein the Court was privileged to weigh the evidence.

The case at bar is not controlled by *Bay State Dredging Co. v. Porter* (1 C.C.A., 1946) 153 F.2d 827. There the release was obtained in consideration of payments to be made in accordance with a state Workmen's Compensation Act. Defendant's agent had made no attempt to advise the plaintiff of his rights under the maritime law. In fact, the agent, himself, had only the foggiest notion of what those rights were. The release taken was marked "preliminary release." The agent, as well as plaintiff, was under the impression that eventually there was to be a full and final release upon the payment of a lump sum, subsequently to be agreed upon.

King v. Waterman S.S. Co. (D.C., S.D.N.Y., 1945) 61 F. Supp. 969, does not aid appellant. It was merely the denial of a *motion for summary judgment* by defendant steamship company, wherein the court held that there should be a trial of the issues, at which the defendant would have the burden of sustaining the release. In the case at bar there has been such a trial and the release has been sustained by verdict of a jury.

Stuart v. Alcoa S.S. Co. (2 C.C.A., 1944) 143 F.2d 178 was in admiralty. The trial judge had held the release not binding, saying: “ * * * a release means practically nothing in a case of this kind’ and ‘where we find the amount which was paid was inadequate, the court will disregard it.’ ” The appellate court noted that the trial judge had over-stated the law of seamen’s releases but affirmed because it appeared that the seaman had had no independent medical or legal advice and had been advised by the company doctor that his injury was not disabling. Again it must be noted that here was a case where the court was affirming a judgment, not reversing it. In our case, Blake had had independent medical advice and had been informed of his legal rights.

In *Stanley v. Weyerhauser* (S.F. Super. Ct.) 1947 A.M.C. 411, defendant’s representative concededly made no attempt to explain to plaintiff the rights accorded him under the Jones Act, and the court, sitting without jury, concluded that the sum of \$60.00 paid in consideration of the release was inadequate in the light of all the circumstance shown.

In the *Stanley* case the court was sitting as *trier of fact*, not as a court of review, hence it was privileged to draw such inferences as it saw fit. No mention had been made to plaintiff of the fact that he might have a right of action for negligence.

The Henry S. Grove (D.C., Md., 1927) 22 F.2d 444, is not in point. There the injured longshoreman was being paid in installments, and releases were taken periodically. This procedure was obviously designed to deceive. Each release taken was identical in form with the previous ones,

so that there was nothing to distinguish the "final" release from the others.

In *Bonici v. Standard Oil Co.* (2 C.C.A., 1939) 103 F.2d 437, the seaman signed a release because of advice given to him by the respondent's doctor to the effect that there was nothing wrong with his injured arm. He had *no* independent medical advice.

Hume v. Moore McCormack Lines (2 C.C.A., 1941) 121 F.2d 336, was an appeal from an order granting *summary judgment* to defendant who had pleaded a release as a bar to a seaman's claim. In reversing, the court held:

"There should be a trial of the issues, on evidence, at which the burden will be on the appellee to sustain the release 'as fairly made with and fully comprehended by the seaman.' " (121 F.2d 347, italics added)

This is a concise statement of the rule for which appellee is contending in the case at bar, to wit, that the validity or invalidity of the release is a question of *fact* which was properly left to the jury.

III.

The Trial Court Did Not Err in Instructing the Jury

As we have pointed out in section I(d) of our argument, *supra*, the trial court did not give the "instruction" to which appellant directs his argument. Furthermore, the second and third instructions "quoted" at page 39 of appellant's opening brief were not given in the form therein set forth (compare R., p. 725, line 20—p. 726, line 10). Nor does it appear that any exception was taken to these instructions (R., p. 734, line 24—p. 735, line 15). In any event the instructions were not erroneous, it being

well settled that a seaman may give a valid release of all claims and demands.

Stetson v. United States (9 C.C.A., 1946) 155 F.2d 359;

Johnson v. Andrus (2 C.C.A., 1941) 119 F.2d 287.

IV.

The Trial Court Did Not Err in Refusing to Admit Evidence

Plaintiff complains that the trial court erred in refusing to admit certain letters in evidence. We have shown, section I(e), *supra*, that no foundation was laid upon which the admission of these letters could be predicated. The letters had nothing to do with the settlement with Blake. He wrote to Mr. Rowse asking about defendant's insurance coverage, not about its liability to him. Furthermore, there was no showing that Rowse had either the requisite knowledge or authority to make representations to Blake, on behalf of defendant, as to his rights under the maritime law. The letters were properly excluded in that they referred solely to insurance and would have been highly prejudicial.

Dam v. Lake Alise Riding School (1936) 6 Cal.2d 395, 401.

V.

Appellee Offered No Misleading or Incorrect Evidence

Counsel for appellant seeks to assign as error the fact that counsel for defendant was apparently confused as to the times at which Blake was paid his "earned wages" and repatriation bonus. This confusion was probably induced by plaintiff and his counsel, who both stated earlier that these sums had been paid *after* Blake returned to the

States (R., p. 667). In any event it was stipulated that these sums were paid prior to the settlement (R., p. 666). The time when they were paid was irrelevant. It is obvious from the portion of the record quoted at pp. 50-53 of appellant's opening brief, that plaintiff was taking the position that he thought he had signed the release in consideration for "earned wages." Counsel for defendant was seeking to bring out the fact that these wages had previously been paid. The date of payment was unimportant.

VI.

Conclusion

It is respectfully submitted that the judgment on the verdict should be affirmed.

Dated: November 18, 1948.

Respectfully submitted,

JOHN ~~W.~~ BLACK,
HENRY W. SCHALDACH,
233 Sansome Street,
San Francisco, California.

LYMAN HENRY,
STEPHEN McREAVY,
HALL, HENRY & OLIVER,
Balfour Building,
San Francisco, California.

Attorneys for Appellee.